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SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 24

STEPHEN J. ROTH, Attorney General of the State of Michigan, etc.,

Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANT

OPINION BELOW

The opinion below in the Court of Appeals for the Sixth Circuit, filed November 30, 1948 *(sub nom. Black v. Delano)*, is reported in 170 F. 2d 966. It is contained in the Record (66-68). There was no opinion filed in the District Court.

GROUND ON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court upon appeal is invoked under Title 28, U. S. Code, Sec. 1254(2), as revised by the Act of June 25, 1948, 62 Stat. 869-992, which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> • • • • •
>
> "(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented; • • •."

Petition of the Attorney General of Michigan was filed June 25, 1946, in the United States District Court for the Eastern District of Michigan, Southern Division, for a declaratory judgment and other relief, pursuant to Sec. 274-d of the then Judicial Code, now in substance Title 28, U. S. Code, Sections 2201-2202 as revised (R. 3-15). The petition prayed that the Michigan law relating to escheatable and abandoned property, as amended by Act No. 170 of the Public Acts of Michigan for 1941, be applied to deposits in First National Bank—Detroit in liquidation, where the depositors' claims have been proven but thereafter for seven years or more the depositors could not be located to receive dividend checks or, if they did receive the same, have failed to cash them.

The Michigan escheat law appears in the record (15-31) and will later be more specifically detailed.

Appellee Connolly, Receiver of the bank, appeared generally as such (R. 37) and moved to dismiss (R. 48-49), among other reasons because the petition failed to state a cause of action; and he relied on Sections 192, 193 and 194 of Title 12, U. S. Code (the National Bank Act), set out in the appendix hereto. The District Court granted the motion and dismissed the case (R. 58).

On appeal the Court of Appeals affirmed (R. 66) and in its opinion stated (R. 68):

> "The present action brought by the State of Michigan to apply its laws of escheat in the circumstances related constitutes an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our former opinions. • • • The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine."

Appellate jurisdiction is invoked under the statute above quoted because the court below thus held a State statute (the Michigan escheat law) "invalid as repugnant to the Constitution, treaties or laws of the United States" (the National Bank Law). This Court on March 28, 1949, having postponed the question of jurisdiction to hearing on the merits (R. 76-77), the jurisdictional question will be discussed in the ensuing argument.

STATEMENT OF CASE

The facts are not in dispute, being admitted by Receiver Connolly's motion to dismiss and, in so far as we believe material, also by an affidavit filed by him in support thereof (R. 49-54).

Preston Delano, Comptroller of the Currency, was also originally a defendant (R. 3). He moved to dismiss because he was not a resident of the district (R. 46-47). The motion was granted (R. 58). As no error has been assigned with respect to such dismissal, he is no longer in the case.

The following facts appear in the petition in the District Court:

Appellee Connolly is the present Receiver of First National Bank—Detroit, a national banking association, and is also the Detroit Representative of the Comptroller of the Currency (R. 3).

First National Bank—Detroit has its principal place of business in the City of Detroit, in the Eastern District of Michigan, Southern Division (R. 4). On February 11, 1933, it closed its doors and did not thereafter resume the conduct of normal banking business (R. 4).

On May 11, 1933, the Comptroller, having found the bank to be insolvent and unable to pay its debts, appointed C. O. Thomas Receiver of the bank. Thomas resigned August 15, 1934, when he was succeeded as Receiver by B. C. Schram. Schram remained as Receiver until his resignation June 15, 1944, when appellee Joseph T. Connolly was appointed Receiver (R. 4-5).

Since June 15, 1944, appellee Connolly has been and is the duly appointed, qualified and acting Receiver of the bank (R. 5).

Appellee Connolly and his predecessors gave notice to claimants to present their claims as set forth in the National Bank Act (R. 5). A majority of the creditors and depositors presented proofs of claim, which proofs of claim were adjudicated and proved as valid claims against the bank (R. 5).

As assets of the bank were collected and liquidated by Connolly or his predecessors, dividends were declared and made payable to such claimants as had filed proofs of claim which had been approved. Up to the time of the filing of the petition in the court below, 100% of the principal of such claims had been made payable to the claimants, and also an interest payment of 7.565% of the principal. The dividends were at various dates from April 12, 1933, to December 7, 1942 (R. 5-6).

The appellee Receiver, or his predecessors, issued dividend checks from time to time as the dividends were declared, but a great number of the checks were returned unclaimed, could not be delivered to the persons entitled thereto, or were delivered to the persons entitled thereto but were not presented for payment by such persons, which checks, or the funds allocated for the payment thereof, now remain in the possession and under the control of the appellee Receiver or the Comptroller of the Currency (R. 6).

The petition sets forth the requirement of the Michigan escheat law, placing upon each depository, as defined in the Act, the duty to make a report to the State Board of Escheats, the report to contain the names of the persons entitled to unclaimed, uncalled for or abandoned money,

securities, credits or property of any kind, where there have been no dealings with the depository in relation to such property within a period of seven years or more prior to the date of the report (R. 7). The petition (R. 7-11) made reference to a number of other provisions of the Michigan statutes in effect at the time the petition was filed. The statute will be discussed in our subsequent argument.

On June 26, 1946, demand was made upon appellee Connolly, Receiver, by the Michigan State Board of Escheats (R. 11, 32), requiring him to furnish a report of all those accounts wherein dividend checks were issued to those persons who had previously filed proofs of claim approved by the Receiver and the Comptroller of the Currency, and which dividend checks were either unclaimed by or not delivered to the persons entitled thereto, or which checks were delivered to such persons but were not subsequently presented for payment (R. 11).

Funds segregated and set apart for the payment of such unpaid dividend checks, together with the unclaimed or undelivered checks, were in the possession or under the control of the Receiver and the Comptroller of the Currency (R. 11). The demand for the report was confined to the checks and funds concerning which no dealings or transactions had been had between the Receiver or the Comptroller and the persons entitled thereto, their heirs, devisees, legatees or assigns, since the time of issuance thereof or for a period of seven years or more last past (R. 11).

The petition averred that, although it was the duty of the Receiver and his predecessors to make the reports required by law with respect to such dividend checks and funds, the Receiver and his predecessors had neglected to file the reports, to the irreparable harm and loss of the

owners of the dividends, their heirs, devisees, legatees and assigns, and the people of the State of Michigan and the primary school system thereof (R. 11-12).

The Receiver, pursuant to direction of the Comptroller of the Currency, was about to remove, as of June 30, 1946, all the abandoned and undelivered dividend checks, together with the funds for the payment of those checks which had been delivered but not presented for payment, out of the jurisdiction of the District Court and to the office of the Comptroller of the Currency in Washington (R. 12). The receiver was also about to remove to Washington the books, records, files, proofs of claim and all other things pertaining to such checks (R. 12). The petition further asserted that such removal would be in violation of the terms and provisions of the statutes of Michigan and would place the property beyond the territorial limits of the State and beyond its process, to the irreparable harm and injury of the owners of the dividends, their heirs, legatees, devisees and assigns, and the people of the State (R. 13).

The liquidation of the bank has been completed and the dividend checks and funds above mentioned represent a separate and distinct segregation of property belonging to the owners, their heirs, devisees, legatees, and assigns, based upon valid proofs of claim filed with the Receiver and in which the State of Michigan, under its escheat laws, has an interest (R. 13).

The petition prayed (R. 13-14) that the court take jurisdiction and declare that the escheat statute of Michigan, as amended, is applicable to First National Bank—Detroit, in liquidation, and that the defendants are subject to and bound by the provisions of such law. The petition also prayed for an injunction during the pendency of the suit, enjoining the defendants from removing the unclaimed, un-

delivered, uncalled for or abandoned dividend checks or the funds segregated for the payment of the dividend checks which had been delivered but not presented, and from removing books, records, files, proofs of claim and allied papers pertaining thereto, from the jurisdiction of the court and out of the State of Michigan (R. 14).

Judge Lederle, on the day the petition was filed, entered an order to show cause, with a restraining order as prayed (R. 35-36).

On the same day as the appearance of appellee Connolly, a stipulation was entered into between the Attorney General and the appellee as Receiver of the bank and Detroit Representative of the Comptroller of the Currency (R. 38-40). This stipulation recited that the books, records, files, etc., of the receivership are about to be removed to Washington and that the subject matter of this suit is included and commingled therein, and that to separate and segregate the latter from all the books, records and files would unduly delay such removal. It was thereupon agreed that Connolly might ship all of his records in his possession in Detroit to the United States Treasury Department, there to be delivered to the Custodian of the National Archives of the United States, where such records will be preserved and maintained. It was further agreed that appellee, or his successor in office, will, pursuant to the order of the court, return to the jurisdiction of the court any and all such records as are requested in the court order, and that the defendant would raise no jurisdictional issue or controversy in the cause because of the fact that such records are not within the jurisdiction. This stipulation further agreed that there are presently six commercial deposit accounts maintained in National Bank of Detroit, Detroit, Michigan, known as "Comptroller of the Currency for the benefit of the creditors of the First National Bank—Detroit,

Dividend Account No. 1, 2, 3, 4, 5 and 6"; and that none of the funds in such accounts would be withdrawn by the Comptroller or appellee Connolly pending final disposition of the case, except that National Bank of Detroit may honor all issued and outstanding dividend checks drawn on the accounts, when properly presented for payment, and except that the Comptroller of the Currency may draw on said accounts and may deliver dividend checks drawn thereon to such persons as may present themselves with satisfactory proof of their being entitled thereto. The stipulation provided for the dissolution of the temporary restraining order of June 25, 1946, and the dismissal of the order to show cause; and an order was entered accordingly on June 28, 1946 (R. 40).

As the appellee failed and refused to file report, as required by the Michigan escheat law, we do not know the amount of declared dividends unpaid on proven claims; but, from oral statements of the counsel for appellee in the Court of Appeals, it is believed to be in the neighborhood of $300,000.00.

On August 13, 1946, appellee filed the motion to dismiss above mentioned (R. 48-49), and on February 3, 1946, filed in support thereof an affidavit of R. B. McCandless, Acting Deputy Comptroller of the Currency (R. 49-54).

The affidavit gives more detail as to the declaration and payment of dividends, indicating that 544,630 claims were originally proven against the bank, aggregating $333,173,379.40 (R. 50). It was asserted (R. 53) that upon the accounting of Schram, the predecessor Receiver, June 15, 1944, "the receivership was deemed technically closed", although appellee Connolly "was given a commission as Receiver to act in such incidental cases that may require action by a Receiver". No denial was made of the aver

ments of the petition that appellee was appointed Receiver June 15, 1944, and has been and now is the duly appointed and acting Receiver of the bank (R. 5), nor was it claimed that the Receiver had been discharged. It was claimed in the affidavit that appellee Connolly's duties as to books, records and checks were being performed by him as an employee of the Comptroller and not as Receiver (R. 53). Connolly, however, in his motion to dismiss, claims he is not a properly appointed or authorized agent or representative of the Comptroller (R. 48-49).

SPECIFICATION OF ERRORS

Appellant intends to urge all his assigned errors (R. 71-73). They may be summarized or condensed as follows: That the Court of Appeals erred:

(a) In not adjudging that the Michigan escheat law is valid and applicable to First National Bank—Detroit in liquidation, and that appellee, as Receiver thereof and as Representative of the Comptroller, is bound by the Michigan law with respect to proven deposits in the bank; and in holding, on the contrary, that the Michigan law, if applied to proven claims of depositors, constitutes an unlawful interference with the liquidation of the bank and is invalid as repugnant to the National Bank Law and in particular to Sec. 194 thereof (Title 12, U. S. Code, Sec. 194; R.S. 5236).

(b) In not holding (although assuming) that the District Court had jurisdiction over the subject matter.

(c) In not holding (although assuming) that appellee Connolly is Receiver of the bank and is subject to this suit, properly brought against him.

SUMMARY OF ARGUMENT

1. Jurisdiction. The Court has jurisdiction under Title 28, U. S. Code, Sec. 1254(2), as revised, because the Michigan escheat law, which applies without discrimination to all banks in the State and receivers thereof, was held by the Court of Appeals invalid as repugnant to the National Bank Law in the case of proven claims against a national bank in liquidation where the Receiver of the bank had been unable to effect payment to the claimants for seven years or more.

The case is not moot by reason of any change in the Michigan law.

No settlement agreement appears of record or was made in fact, affecting the present case.

An important and substantial question is involved.

2. Alternate certiorari. If appeal does not lie, certiorari should be granted in Docket No. 21 and the case decided.

3. Michigan escheat law not invalid as repugnant to federal law. The Michigan law is not invalid as repugnant to the National Bank Law in its application to proven claims against a national bank in liquidation.

This is not the case of attempted escheat with respect to unproven claims where moneys which would have been payable on such claims if proved may go by tontine right to augment payment on proven claims or, if a surplus results, may go to shareholders.

The State properly succeeds to proven claims abandoned by the claimants. The United States has no power to es-

cheat property to itself, and State law, in governing escheat of proven claims, properly provides for succession thereto just as State law governs other devolution of property.

It has been held by this Court (*Anderson National Bank v. Luckett*, 321 U. S. 233) that escheat laws do not unlawfully interfere with operating national banks. *A fortiori* they are not invalid as repugnant to the National Bank Law in the case of a bank in liquidation.

The case comes within the general rule holding State laws lawfully applicable to national banks when the laws are not contrary to the provisions of the federal law and do not interfere with the functions and purposes of the banks.

The Michigan statute complies with the requirements of due process.

The question is not *res adjudicata* by reason of earlier cases in the Court of Appeals which related to the different subject of the right of the State to effect escheat of dormant claims which the depositors never proved.

4. Other federal questions. The other questions involved, assumed in the Court of Appeals in appellant's favor, should be so decided.

The District Court where the bank was located had jurisdiction of the subject matter.

The Receiver, who is the only necessary and proper party, is before the Court and was properly sued. He has not been discharged, nor is the receivership closed.

This is not a case against the United States, which has no power to escheat money to itself and which admits liability to pay the money to proven claimants.

ARGUMENT

I

The Court Has Jurisdiction of This Appeal.

The question of jurisdiction has been postponed to the hearing on the merits (R. 76-77). While our contentions are contained in our previously printed Statement as to Jurisdiction and Brief in Opposition to Motion to Dismiss or Affirm, we shall, for the convenience of the Court, repeat the substance of the argument here.

A. The Michigan statute. The statute of the State of Michigan the validity of which is involved is the Michigan law relating to escheatable and abandoned property, being Act 238 of the Public Acts of Michigan for the year 1897 and amendments thereof, being Sections 13,455 to 13,477, both inclusive, of the Compiled Laws of Michigan for 1929 (Vol. 3, p. 4814), and Mason's Supplement of 1940 (p. 1431), as amended by Act 170 of the Public Acts of Michigan for 1941 (p. 245).

The Michigan Constitution of 1908, Article VI, Sec. 20, creates a State Board of Escheats, composed of the Secretary of State, the State Treasurer and the Commissioner of the State Land Office (Vol. 1, Comp. Laws of Mich. 1929, p. 216).

The pertinent provisions of the statute are printed in the Record (15-31) and summarized in our Statement as to Jurisdiction (pp. 2-7). Inasmuch as the Court of Appeals held the Michigan law invalid on the broad ground that a State escheat law interferes with the liquidation of a national bank under the federal statute rather than because of any particular provision of the Michigan law, we shall

merely present the structural outline of the Michigan statute, quoting those parts showing its express application, among other things, to a bank in liquidation and the receiver thereof.

Sec. 13a of the escheat law (R. 27) provides:

> "If any depositor, as hereinbefore defined, who or which has any money, credits, securities or property of any kind which is in the possession or under the control of any depository, doing business, located or operating within this state, where no dealings or transactions have been had with respect to any such property between such depositor and the depository having possession or control of such property for a period of 7 years or more, such depositor shall be presumed to have abandoned such property, and such property shall escheat to this state."

Sec. 4b of the law (R. 17) provides:

> "The words 'person' or 'persons' as used in this act shall be understood and interpreted to mean and include a natural person, a copartnership, a company, an association, a bank, a trust company, a corporation, except municipal corporations, or any officer thereof, any governmental department, agency, instrumentality or official, a depository, a receiver, a trustee, a fiduciary, a debtor, a custodian, a liquidating officer, or any combination of natural persons.
>
> "The words 'depositor' or 'depositors' as used in this act shall be understood and interpreted to mean and include any person, or persons, as above defined, who or which is the legal or equitable owner or creditor entitled to the possession of any property, real, personal or mixed, including liquidated choses in action,

which is in the possession or under the control of any other person, as above defined, who or which is indebted or accountable for any such property to such depositor.

"The word 'deposit' as used in this act shall be understood and interpreted to mean and include money, credits, securities, liquidated choses in action and property of any kind or nature.

"The word 'depository' as used in this act shall be understood and interpreted to mean and include any persor, as above defined, who or which has in his or its possession or under its control any property, real, personal or mixed, including liquidated choses in action, for which he or it is indebted or accountable to any other person as depositor."

Sec. 6 (R. 18) provides:

"On the thirtieth day of June in every year after the taking effect of this act, it shall be the duty of each person within this state, who or which as a depository is indebted or accountable to any other person for money, credits, securities or property of any kind to make a report * * * to the State Board of Escheats * * *, where no dealings or transactions have been had between the depositor and the depository with respect to any money, credits, securities or property of any kind for a period of 7 years or more * * *."

The State Board and the Attorney General are given the power to demand such reports (Sec. 6a; R. 19), a penalty of $300.00 plus $10.00 a day for delay being placed upon those failing to make report after demand (Sec. 7; R. 20). The Attorney General has the duty to file a bill in chancery to compel reports (Sec. 9; R. 21).

Sec. 9a (R. 22) subjects to escheat, in the case of a depository operating within the State whose business is being liquidated, any money or credits belonging to a depositor for which no claim has been filed or for which no demand has been made, where no dealings were had with the depository or with the receiver, custodian or liquidating agent for a period of seven years; and authorizes the Attorney General to intervene in behalf of the People of the State or to institute suit to have such property decreed to be escheated to the State. The Attorney General is also authorized to file claims with the receiver, custodian or liquidating agent, dividends thereon to be paid to the State Board.

Two alternate methods are provided for the collection and administering of escheatable funds.

Sec. 9b (R. 23) provides that, where money, credits, etc., have been unclaimed or uncalled for or abandoned for a period of seven years or more by the depositor, the Attorney General, in the name of the People of the State, may institute suit in the Circuit Court, in Chancery, to escheat the same, in which suit the depository and the depositors shall be made parties defendant. The section requires that personal service shall be made upon the depositories and upon the depositors, if they be found, and, if not, that they be served by publication for six successive weeks in a newspaper printed and published in the county. The court at the hearing is directed, upon a finding that the property has been abandoned, to decree the property escheated or transferred to the State and to direct that the same be paid to the State Board of Escheats.

Sec. 10 (R. 24) provides an alternative method in the case of a depositor whose identity is unknown or where the depositor has had no dealings or transactions in regard to

the property within seven years, and where there is good reason to believe that the depositor is dead. In such case the Attorney General, or the State Public Administrator, is given the duty to take proceedings to have an administrator appointed in the proper Probate Court to administer upon the estate of such missing depositor as a deceased person.

The administrator, upon giving bond, is given the right and duty to demand and receive from the depository deposits of the missing depositor, the administrator being also given rights of action to reduce the same to possession and control as administrator. The section further provides that, if there are no known heirs, legatees, devisees or assigns of the missing depositor, then, upon the allowance of the administrator's final report and accounting, the administrator shall assign the property or funds to the State Board of Escheats.

Sec. 10a (R. 24-25) provides that, in case there are no known heirs, legatees, devisees or assigns of a depositor, it shall be sufficient proof for the purposes of escheat when it appears from reliable sources and the books and records of the depository that the disappeared or missing depositor has had no dealings or transactions with the depository for a continuous period of seven years, but it is provided that, within thirty days after the granting of administration, notice of the granting of administration shall be published in the form of similar notices in the administration of the estates of deceased persons, and that notice of the hearing on the final account of the administrator shall be published for three weeks prior to the date of the final hearing.

Sec. 13 (R. 26-27) creates a presumption of death where any person disappears and his whereabouts remains unknown for the space of seven years and no knowledge of

such person can be procured for such period, and provides that, if no person or persons are found who would be his heir or heirs at law, then administration upon his estate shall be taken in accordance with the provisions of the law.

Sec. 15 (R. 27) provides that, upon the completion of the administration of an estate, escheated property shall be turned over to the State Board of Escheats as trustees, which shall cover the property or the avails thereof into the State treasury for the use of the primary school fund.

Sec. 21 (R. 29) directs that the Board of Escheats shall keep records of the property coming into its care and the time and amount of money covered into the State treasury on account of each estate, the account to be kept in the office of the State Treasurer as a public record.

Sec. 22 (R. 29-30) provides that, "*at any time*" after property is assigned to the State as an escheated estate or as abandoned property, any person may file with the Board of Escheats satisfactory proof, to be determined by the Board, of the right of such person, as husband, wife, heir at law, next of kin, devisee or legatee or assign, to the estate of the disappeared, missing or deceased person, in which case the Board, upon the payment to the Board of expenses which have been incurred in relation to the estate, shall cause the property to be turned over to such person. This section contains a similar provision giving the right to the assignee of any depositor other than a depositor who was a natural person, "*at any time*" upon satisfactory proof, to obtain the property. A like right is given to the depositor presumed to be deceased or to have abandoned his property and whose estate has been administered or whose property has been decreed to have been abandoned, "*at any time*" upon satisfactory proof of his identity and right to the property, to receive the property. The section further provides that payment shall be made out of any

money in the State treasury which has been derived from escheated estates or abandoned property, and the persons entitled to the deposit are expressly given the right to review by the Michigan Supreme Court, by certiorari, of any final decision of the State Board.

No time limit whatever is imposed upon the right of the person entitled to the property to claim the same.

Sec. 23 (R. 30-31) provides indemnity to the depository who has paid money or property to an administrator or the State Board of Escheats who is thereafter required to carry out and perform the contract of deposit with the depositor or the heirs, holders for value or assigns of the depositor or the person in whose name the property was held; the State being required to pay to the depository the amount of damage or loss it may have sustained, the amount to be paid out of any money in the State treasury which has been derived from escheated estates or abandoned property. The depository is given the right to review any final decision of the State Board of Escheats by the Michigan Supreme Court, by certiorari.

While there are other provisions of the statute relating to escheat of real property, the sale thereof and other details, the foregoing is a summary of the provisions believed pertinent to the issues in this suit.

B. The lower court held the Michigan law invalid as repugnant to the National Bank Law.

The sole question as to jurisdiction is whether appellant was "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States" (Title 28, U. S. Code, Sec. 1254(2) as revised).

Cases sustaining the jurisdiction of the Supreme Court of the United States in appeals from a Circuit Court of Appeals where that Court has held a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States are *McCarroll, Commissioner of Revenues of Arkansas, v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176; *New State Ice Company v. Liebmann*, 285 U.S. 262; *People of the State of New York v. Latrobe*, 279 U.S. 421; *Republic Pictures Corp. v. Kappler*, 327 U.S. 757; *Keating v. Public National Bank*, 284 U.S. 587; *City of Richmond v. Deans*, 281 U.S. 704; *Ott v. Mississippi Barge Line*, 336 U.S. 169.

While the above cases were decided under Sec. 240 of the Judicial Code (Title 28, U.S. Code, Sec. 347) before its recent revision, the present section, as revised by the Act of June 25, 1948 [Title 28, U.S. Code, Sec. 1254(2)], is substantially identical on the ground for appeal. See reviser's notes to revised Sec. 1254.

The decision below (R. 68) was expressly based on the merits, the Court holding that application of the Michigan law consitutes an unlawful interference with the liquidation of a national bank, thus determining that the Michigan statute is invalid as repugnant to the National Bank Law and in particular to Sec. 194 (Title 12, U.S. Code, Sec. 194; R.S. 5236), which provides:

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are

paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

This point was urged by defendant Connolly in the District Court and Circuit Court of Appeals as ground for the dismissal of the petition in the District Court and the affirmance of such dismissal, in that the petition failed to state a cause of action if the Michigan law was invalid as repugnant to the federal statute.

The Court below in its opinion (R. 66-67) referred to three earlier cases in the same Court, viz.:

Starr v. O'Connor, 118 F. 2d 548 (decided Mar. 14, 1941), certiorari denied 314 U.S. 695;

Rushton v. Schram, 143 F. 2d 554 (decided May 31, 1944);

Starr v. Schram, 143 F. 2d 561 (decided May 31, 1944).

These are earlier cases involving different issues.

The first of the cases above mentioned involved the law of Michigan prior to its amendment in 1941, which the present case concerns.

The second two cases above cited relate to the Michigan statute now involved.

However, all three cases related to attempts of the then Attorney General of Michigan to apply escheat law to dormant deposits in the First National Bank—Detroit in

liquidation, *where the depositor had failed to present a claim.*

The present case relates solely to *proven claims* where the claimant *after proving his claim* has disappeared for seven years or more. That this is an entirely different situation, we shall later point out.

That appellant was relying on a State statute, viz., the Michigan escheat law, is of course undenied. But appellee contends that the Court of Appeals merely held the statute inapplicable to a national bank in liquidation and not invalid as repugnant to the National Bank Law. Appellee is demonstrably in error.

Appellee repeatedly contended below that the Michigan statute was an unlawful intrusion upon the National Bank Law. To this the Court below agreed, although as we contend, erroneously.

In the earlier case of *Rushton v. Schram*, 143 F. 2d 554, two of the three judges did base their decision as to unproven claims on the ground that the Michigan statute was not retroactive to the seven-year period prior to the bank failure, but the third (Simons, C. J.) based his decision on the invalidity of the Michigan statute as repugnant to the National Bank Law, stating (p. 561):

> "I think, however, that the amended Act, at least insofar as it permits the state administrator to exercise powers of visitation and inquisition, and insofar as it imposes penalties upon an agency of the federal government in possession of the assets of an insolvent national bank, operates as an unlawful interference with the liquidation of a national bank provided for in Sec. 194, 12 U.S.C.A., of the National Banking Act.

> • • • I think the state is not empowered to interfere with it without the government's consent, clearly expressed in Congressional enactment."

The decision of the other two judges was contrary to *Evans Products Co. v. State Board*, 307 Mich. 506. Furthermore, it is not a retroactive application of the Michigan law in the present case of abandonment of proven claims to apply it to antecedent facts, i.e., part of the abandonment period after the claims were proved. *Cox v. Hart*, 260 U.S. 427, 435. In *Provident Institution for Savings v. Malone*, 221 U.S. 660, *Anderson National Bank v. Luckett*, 321 U.S. 233, and *United States v. Klein*, 303 U.S. 276, escheat laws passed or amended after all or a part of the dormancy period were held properly to embrace such prior periods.

The entire Court, apparently recognizing that the reason assigned by Judge Simons was the only ground upon which the decision could be plausibly based, accordingly in *Starr v. Schram*, 143 F. 2d 561, 562, held:

> "Upon conclusion of the hearing, the district court decreed that the escheat statutes of Michigan, including Act 170 of the Public Acts of Michigan for 1941, which was enacted subsequently to our decision in *Starr v. O'Connor*, supra, constitute an unlawful interference with the liquidation of an insolvent national bank, and are inapplicable to the receivedship in the instant case. The district court's decree to this extent was correct."

The Court below in the instant cause pointed out its prior unanimity on this ground (R. 67-68; 170 F. 2d 966, 967) and decided the instant cause expressly "on the merits", stating (R. 68; 170 F. 2d 967):

> "The present action brought by the State of Michigan to apply its laws of escheat in the circumstances

related constitutes an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions."

Appellee, in support of the alleged correctness of the decision below, cites *Davis v Elmira Savings Bank*, 161 U.S. 275, and *Easton v. State of Iowa*, 188 U.S. 220, both of which held State laws invalid as repugnant to the National Bank Law. Therefore, appellee himself must believe that the decision below was a holding that the Michigan escheat law was invalid as repugnant to the federal law.

If the Michigan law did not "apply" to a national bank in liquidation, the Court below could not have found that it constituted " an unlawful interference". It would merely have construed the law to be inapplicable. *An unlawful interference can occur only when a statute does apply but is invalid as repugnant to the federal law.* This is what the Court below held and it is from such a holding that right of appeal to this Court is expressly granted by the statute. The Court below did not point out, nor can there be discovered in the Michigan law, anything to make it "inapplicable" to a national bank in liquidation. Sec. 13a of the Michigan law (R. 27) provides for escheat to the State when a depositor has any moneys or credits in the possession or control of a depository where no dealings or transactions have been had with respect thereto between the depositor and the depository for seven years or more. Sec. 4b of the Michigan law (R. 17) defines "depository" to include "any person" and defines "person" to include, among other things, a bank and *any* governmental official, receiver, fiduciary or liquidating officer. The statute therefore applies to a national bank in liquidation, but was erroneously held below to be invalid in so doing as repugnant to the National Bank Law.

Appellee's references to cases dealing with appeals from State courts have no bearing on the present appeal. Appeal in such case is available where a State statute is held valid after its validity "is drawn in question" by the future *appellant* "on the ground of its being repugnant to the Constitution, treaties or laws of the United States" (Title 28, U.S. Code, Sec. 1257(2) as revised). The entire burden is thus upon the appellant; and it has long been the rule that he must clearly raise the issue of validity below and obtain a decision thereon.

An appeal from a Court of Appeals, however, is available to one who has brought an action relying on a State statute, which statute is held repugnant to the Constitution, treaties or laws of the United States (Sec. 1254(2) as revised). Appellant here sought a declaration that the Michigan escheat law applied to a national bank in liquidation and that the appellee was subject to and bound by the law (R. 14). This presented squarely the question of whether the statute was valid State legislation. Appellee claims that he at no time raised the issue of validity of the escheat law. As a matter of fact he claimed below that the State law was an invalid intrusion upon the National Bank Law. But if appellee had not so claimed, this would be irrelevant. If the right to appeal is to rest upon issues raised by the *appellee* and within his power to phrase as he pleases, the appellant's statutory right becomes a nullity. The holding of the Court of Appeals is the sole determining factor under Sec. 1254(2), whether that holding is of the court's own motion or in response to appellee's contention.

The cases cited by appellee with respect to appeals from State courts, even if applicable to the present situation, do not support the contention that appeal will not lie from a State court when a statute is sustained, although attacked because it infringes federal rights. *Charleston Federal*

Savings & Loan Association v. Alderson, 324 U.S. 182; *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649; and *Baltimore National Bank v. Tax Commission*, 296 U.S. 538, are cases where the appellant did not timely contend explicitly below that the statute was invalid, or where administration of the statute was attacked and not the validity of the statute itself. Of course, when the validity of the statute was properly "drawn in question" because of its interference with federal rights, this Court does grant appeals from State courts, as required by the statute. *Lawrence v. State Tax Commission*, 286 U.S. 276; *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154; *Chassaniol v. Greenwood*, 291 U.S. 584; *Senn v. Tile Layers Protective Union*, 301 U.S. 468; *Richfield Oil Corp. v. State Board*, 329 U.S. 69. The right of appeal accrues when there was properly "drawn in question" a particular unconstitutional application of the State statute rather than the validity of the statute as a whole. *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282; *Furst v. Brewster*, 282 U.S. 493. See also *Fleming v. Rhodes*, 331 U.S. 100, 103, 108.

Appellee's contention is equally unfounded when he claims that appeals do not lie from a court of appeals where a State statute is held not to be validly applicable because the application would infringe federal rights. Appellee criticizes the cases cited by us on the ground that in such cases it was held that the State had no power to enact the legislation in question because of federal constitutional prohibition. But that is precisely what happened in the instant cause when the Court held the escheat law to be an unlawful interference with liquidation of a national bank under Sec. 194 of the National Bank Law, this being, according to Judge Simon's statement in the earlier case of *Rushton v. Schram*, 143 F. 2d 554, 561, a thing the State is "not empowered" to do. *"Applicability" is the sine qua non of "unlawful interference". If the State law*

was inapplicable, there would have been no interference, unlawful or otherwise.

While the Court below did not hold that Michigan could not enact an escheat law, it did hold that it had no power to enact such a law as applicable to a national bank in liquidation. Such holding was wholly decisive in this case on the question of invalidity of the State law as repugnant to the National Bank Law. A statute may be invalid as applied to one state of facts and yet valid as applied to another, so that in any particular case the question of invalidity *in toto* is not at issue. *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282; *Poindexter v. Greenhow*, 114 U.S. 270; *St. Louis, etc., Ry. Co. v. Wynne*, 224 U.S. 354.

Gamble v. Daniel, 281 U.S. 705 (from 39 F. 2d 447), cited by appellee, does not sustain his position. The holding below did not declare invalid a State insolvency law, but decided merely that upon bankruptcy the State liquidator was properly required to turn over assets to the bankruptcy trustee. The State law did not provide otherwise. In *Reeves v. Williamson*, 317 U.S. 593 (from 127 F. 2d 657), also cited by appellee, the holding below did not invalidate the Kentucky tax statute, but merely its attempted administrative application to postal savings not expressly covered by the statute. In the instant cause, the Michigan escheat law expressly covered all banks and receivers thereof, but was erroneously held invalid because of its alleged interference with national banks. When validity of the same Kentucky statute was drawn in question in a case where, by its terms, the law applied to out-state deposits, this Court did allow an appeal. *Madden v. Kentucky*, 309 U.S. 83.

In any event, cases of appeal from Courts of Appeal decided before the Act of June 25, 1948, are no longer

completely controlling. *Congress has enlarged the right of appeal from such courts.* Prior to the recent revision, Sec. 240(b) of the Judicial Code (28 U.S. Code, Sec. 347) confined the right of appeal to cases where the validity of the State statute "is drawn in question", the same words used with respect to appeals from State courts. But as revised in the present Sec. 1254(2), the requirement for appeal is merely that the State statute relied on be held to be invalid under federal law. It is no longer material whether such validity "was drawn in question" by the appellee. Thus *an appellee* can no longer seek to prevent an appeal by the way he phrases his pleading. The sole criterion is the holding of the Court of Appeals.

Nor is appellee correct in his reliance upon *P. J. Carlin Construction Co. v. Heaney*, 298 U.S. 637, *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221, and *North Dakota v. Olson*, 280 U.S. 528, in support of the contention that the instant cause involves merely the question of which of two statutes applies. There was no real conflict between the statutes in the cited cases. But in the instant cause there was found to be a direct clash, in that the one was held "unlawfully to interfere" with the other. This case is precisely like *RFC v. Beaver County*, 328 U.S. 204, where this Court denied a motion to dismiss appeal in a case where the application of a Pennsylvania tax statute was claimed to conflict with the RFC statute. This case is directly controlling here.

C. The case is not moot. Appellee, in his statement opposing jurisdiction and also in opposing certiorari in the companion case (Docket No. 553, October Term, 1948; Docket No. 21, October Term, 1949), for the first time claimed as a defense that by Act No. 329 of the Public Acts of Michigan for 1947 (p. 591) (after the institution of this suit) the State, in enacting a new code of escheats,

repealed the statute here involved, although expressly providing (Sec. 65) "that no pending suit or proceeding shall abate or be in any way affected by such repeal".

To state this saving clause is sufficient to end the question of "mootness". Declaratory judgment suits are, of course, "suits or proceedings" and by the express terms of the federal statute have the force of final judgments subject to review, and in such a suit, after judgment and after reasonable notice and hearing, further relief may be granted under the statute without further suit (Title 28, U.S. Code, Sections 2201-2202).

This would be true even if the federal statute did not expressly so provide. As stated in Borchard, Declaratory Judgments (1934 ed.), page 172:

> "The declaration is an authoritative adjudication and guide to conduct, and rarely, so far as records disclose, has it become necessary again to invoke the aid of the court to carry a declaratory judgment into forceful effect. Whether or not the original declaratory order or decree reserves the liberty to apply for further relief, if necessary, such liberty is always implied and the American statutes make special provision for it."

Aside from the fact that in the pending suit, under the Michigan statute here involved and the federal statute, full relief can be given, it is clear that, even if it were necessary to institute a new suit under the new Michigan code (because the Receiver or the Comptroller refused to abide by the decision of this Court), this Court's determination would still be controlling of suit under the new code. *The decision below was not based on any particular wording of the Michigan law or on alleged inapplicability thereof.*

but was on the square ground (R. 68) that the Michigan law unlawfully interfered with the liquidation of a national bank under federal law. A decision here affirming the court below would make void not only the Michigan statute here involved but the new Michigan code and any otherwise valid escheat law of any State which purported to apply, among other things, to national banks in liquidation. A decision here reversing the court below, however, would validate not merely the law here involved but also the new Michigan escheat code and valid laws of all other States.

The new Michigan code does not vary from the law here involved in its applicability to all banks and receivers; and appellee has failed to point out in what way material to the questions here at issue it differs from the former law. It does not differ.

The chief meritorious question here is: Can the State of Michigan, by an otherwise valid escheat law, obtain escheat of proven claims against national banks in liquidation, or do the funds remain indefinitely in the United States Treasury because the State law is invalid as repugnant to the federal law?

The present controversy is actual, immediate and real and neither academic nor moot. Appellee never claimed otherwise until his briefs here in opposition to review, and the court below did not so find in its decision on the merits seventeen months after the passage of the new Michigan code.

Far from being moot, the present suit is the indispensable step crossing the threshold of enforcement of State escheat laws. Appellee refuses to make report of the amounts of proven deposits unclaimed and the names of the depositors (R. 12). It is the rest of the procedure to

collect which becomes moot, if the State law is held invalid, in that no further action can be taken without such records. If, on the other hand, the law is held to be valid, not only will the reports be obtained but the declaratory judgment law permits further action in this suit to collect the funds (Title 28, U.S. Code, Sections 2201-2202).

D. No settlement agreement disposed of this suit. Appellee sought to prevent review by asserting, in opposing appeal and certiorari, and by appending to his brief in present Docket No. 21, a settlement agreement of prior suits involving the entirely different question of claims which had been abandoned and not proved by the claimants. No settlement agreement was pleaded (R. 48-49), nor is the agreement in the record below or in any prior proceedings in this Court. An attempt in the court below to prejudice the court by a document referring to and quoting from the settlement agreement was stricken from the files (R. 65-66), "for the reason that it carries beyond the record in the case and contains argumentative matter not presented consistently with the rules of this court". It should likewise be stricken here.

If this Court cares to look at all at this improperly presented agreement, it will be seen at once that it only settled claims on dormant unproven deposits and not the right of the State to succeed to proven claims later abandoned, which is the matter now at issue for the first time.

Now that the Solicitor General of the United States has been substituted as counsel for appellee in lieu of his prior counsel, we doubt that further reference will be made to matters outside the record, not pleaded, and irrelevant in any event.

E. A substantial question is involved. The amount involved in the suit is large. The case was decided on the merits. The Supreme Court of the United States has not heretofore decided the exact question, although it has decided that similar State escheat laws are not repugnant to the National Bank Law when applied to an operating national bank. *Anderson National Bank v. Luckett*, 321 U.S. 233.

The Supreme Court of the United States has likewise held an escheat law applicable to funds which under federal statute have been covered into the Treasury. *United States v. Klein*, 303 U.S. 276. The present case is the only one which has applied contrary doctrine to proven deposits in a national bank in liquidation.

Solution of the problem of supposed clash between the National Bank Law and proper State escheat laws is a substantial one and important not only to the State of Michigan but to other States. Banks, whether State or national, are the largest source of escheatable funds. The United States has not passed any federal escheat law, the same being a subject reserved to the States. Large sums in the case of First National Bank—Detroit and many other national banks in liquidation now are and for many years have been in the Treasury of the United States awaiting payment on proven claims where the claimant has disappeared or died without known heirs, which sums, unless the National Bank Law conflicts, should be taken by the States where the banks were located for payment to the claimants, or the successors of the claimants, if they can be located by proper State judicial proceedings and publication of notice.

II.

If Appellate Jurisdiction Is Denied, Certiorari Should be Granted.

Appellant is also applying for certiorari with respect to the same judgment (Docket No. 553, October, 1948, Term; now Docket No. 21, October, 1949, Term). This is pursuant to the procedure approved in *Bradford Electric Light Co. v. Clapper*, 284 U. S. 221. Appellant believes this Court has jurisdiction of the appeal. The Court has held the certiorari petition in abeyance pending determination of appellate jurisdiction. If appellant is mistaken as to his right of appeal, it is requested that, because of the importance of the questions involved and for the reasons asserted in his certiorari petition, writ of certiorari be granted and the case decided. This is what was done under similar circumstances in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368.

III.

The Michigan law is not invalid as repugnant to the National Bank Law in its application to proven claims against a national bank in liquidation.

The above statement presents the chief issue on the merits and the only one determined against the appellant in the Court of Appeals.

A. This case is not an attempted escheat of unproven claims. The court below recognized that this case differed from prior cases in that it related to proven claims thereafter abandoned by the depositors and not to dormant claims which the depositors had never proven. The court's

error was in holding that the difference was immaterial and that nevertheless there is here an unlawful State statutory interference with a national bank in liquidation, the court stating (R. 68):

> "The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine."

But the "settled doctrine" in the court below was with respect to the attempt of the State to succeed to claims which the depositor had failed to prove, an entirely different matter where there may well have been a clash with the federal law as to payment of liquidation dividends.

The first of the earlier cases, *Starr v. O'Connor* (1941), 118 F. 2d 548 (certiorari denied 314 U.S. 695), related to a different escheat law of Michigan than the one presently involved. The case was tried on a stipulation of facts covering $1,799,097.66 of bank deposits "upon which no claims had been presented to and accepted by the receiver" (p. 550). *The instant case, on the contrary, relates solely to claims which the depositor filed and had allowed but where he could not later be located to receive dividend checks or, if he did receive the same, has not cashed them for seven years or more* (R. 6, 11-12). The decision in *Starr v. O'Connor, supra,* was based (p. 566) on *First National Bank of San Jose v. California,* 262 U.S. 366, on the ground that the then escheat law of Michigan contained provisions conflicting with the National Bank Law and was "closer akin to illegitimate laws of forfeiture than to legitimate laws of escheat". This is the only case involving any Michigan escheat law which this Court has refused to review, the former escheat law of Michigan having contained provisions held unlawful in the *San Jose* case.

The next two cases in the Sixth Circuit, *Rushton v. Schram*, 143 F. 2d 554, and *Starr v. Schram*, 143 F. 2d 561, both decided May 31, 1944, did relate to the Michigan escheat law now involved, *but also solely to dormant deposits where no claim had been filed or allowed.* This difference the court below recognized in the instant case, as above pointed out.

When escheat is sought with respect to deposits where the depositor has never filed claim, it may well be argued that the State law does conflict with the National Bank Law (Title 12, U.S. Code, Sec. 194), which requires the Comptroller to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction", and which further requires that "the remainder of the proceeds, if any, shall be paid over to the shareholders" of the bank.

Thus a non-proven claim may be foreclosed and payments on proven claims thus augmented or, if a surplus results, the amount otherwise payable on an unproven claim may go to shareholders. This would be analogous to distribution in bankruptcy and equity receiverships. The National Bank Law, in the case of unproven claims, may thus decree a tontine right for the benefit of proven claims and shareholders and foreclose the State's right to succeed to unproven abandoned claims. This may be the correct basis for the decisions of the court below in the earlier cases relating to unproven claims and one of the reasons for denial of certiorari in the only earlier case in which certiorari was sought. It was the basis of denying escheat with respect to unproven claims in the case of *In re Commercial National Bank*, 45 F. Supp. 482 (E.D. Pa.), affirmed on opinion below 134 F. 2d 172 (C.C.A.3).

But, as we shall now point out, there is no such tontine right prescribed whereby funds payable on proven claims later abandoned go to augment payments to other claimants or to shareholders.

B. The State properly succeeds to proven claims later abandoned. Sec. 194 of the National Bank Law does not prescribe a tontine right whereby funds payable on proven claims, later abandoned, go to augment payments to other claimants or to shareholders. Cf. *Provident Institution for Savings v. Malone*, 221 U.S. 660, 665, and *Security Savings Bank v. California*, 263 U.S. 282, 286. While these cases relate to the application of escheat laws to operating State banks, they point out clearly that other depositors or shareholders should not profit from money owing to persons who have disappeared.

Thus in the *Malone* case the Court stated, page 665:

> "Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation, the then depositors would receive the money of those absent and unknown. On dissolution the shares of a depositor, who could not be found, would be paid over to his legal representative, who might be an administrator in case his death was established, or a guardian, in case of mental incapacity, or a trustee in bankruptcy in case of insolvency, or a representative appointed under statutes applicable to abandoned property."

Under the National Bank Law, not only is there no tontine right to profit from moneys owing on proven claims, but the Court rigidly enforces the rule of ratable payment on all proven claims. *Merrill v. National Bank of Jacksonville*, 173 U.S. 131, 143; *American Surety Co. v. Bethlehem National Bank*, 314 U.S. 314, 317. This goes to the extent

of denying preference to claims even of the United States itself, which is otherwise preferred under a general statute. *Cook County National Bank v. United States*, 107 U.S. 445.

The appellee, while not denying the rule of ratable payment or asserting a tontine right of succession to proven claims, seeks to accomplish a result which in practice would effect a non-ratable payment and a preference to the United States even though it has no claim at all, viz.: That money unpaid on proven claims should be held indefinitely in the United States Treasury until the claimant appears, if ever, the United States keeping the same if the claimant never appears. His appearance after seven years is unlikely, as the Comptroller refuses a report on the amount of the claim and no federal law provides for court proceedings and publication of notice to locate a disappeared claimant or his successors.

The National Bank Law (Sec. 194) requires payment on proven *claims*, not necessarily to the *claimant*. Thus a successor to an original claimant, by assignment, attachment, subrogation, or administration of his estate, is held entitled to stand in the original depositor's shoes. *Earle v. Conway*, 178 U.S. 456 (attachment of deposit in insolvent national bank); *American Surety Co. v. Bethlehem National Bank*, 314 U.S. 314 (subrogation to depositor in insolvent national bank); see also *Provident Institution for Savings v. Malone*, 221 U.S. 660, 665, and *Anderson National Bank v. Luckett*, 321 U.S. 233, 252.

The State has sole power over abandoned property just as it does over other transfers and devolution of property (*Anderson National Bank v. Luckett*, 321 U.S. 233, 240-241, 248) and hence proper escheat laws apply to banks, whether State or national. *Provident Institution for Savings v. Malone, supra; Anderson National Bank v. Luckett, supra; Security Savings Bank v. California, supra.*

While the *Anderson National Bank* case concerned application of State escheat law to an operating national bank, its reasoning is directly applicable to the present case. This Court there stated, pages 240-241:

> "Apart from questions which may arise under the national banking laws in the case of national banks, it is no longer open to doubt that a state, by a procedure satisfying constitutional requirements, may compel surrender to it of deposit balances, when there is substantial ground for belief that they have been abandoned or forgotten, *Security Bank v. California, supra;* certainly when the state acquires them subject to all lawful demands of the depositors. *Provident Savings Institution v. Malone*, 221 U.S. 660.
>
> "The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion. See *Security Bank v. California supra*, 285 and cases cited. *Irving Trust Co. v. Day*, 314 U.S. 556, 562. And it is within the constitutional power of the state to protect the interests of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively abandoned, see *Provident Savings Institution v. Malone, supra*, 664, just as it may provide for the administration of the property of a missing person. *Cunnius v. Reading School District*, 198 U.S. 458; *Blinn v. Nelson*, 222 U.S. 1."

Page 248:

> "As we have seen, a bank account is a chose in action of the depositor against the bank, which the latter is obligated to pay in accordance with the terms of the deposit. It is a part of the mass of property

within the state whose transfer and devolution is subject to state control. *Security Bank v. California, supra,* 285, 286, and cases cited; *Irving Trust Co. v. Day, supra,* 562. It has never been suggested that nondiscriminatory laws of this type are so burdensome as to be inapplicable to the accounts of depositors in national banks.

"The statute here attacked does not purport to do more than does any other regulation of the devolution of bank accounts of missing persons, a function which is, as we have seen, within the competence of the state. Under the statute the state merely acquires the right to demand payment of the accounts in the place of the depositors. Upon payment of the deposits to the state, the bank's obligation is discharged. Something more than this is required to render the statute obnoxious to the federal banking laws. * * *"

and, page 252:

"* * * under the Kentucky statute, as in the case of an attachment or the administration of the estate of a deceased depositor, a change in the dominion over the accounts will ensue, to which the bank must respond by payment of them on lawful demand. But this, as we have said, is nothing more than performance of a duty by the bank imposed by the federal banking laws, and not a denial of its privileges as a federal instrumentality. In all this we can perceive no denial of constitutional right and no unlawful encroachment on the rights and privileges of national banks.

"Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority,

require the banks to file reports of inactive accounts, as the statute directs. *Waite v. Dowley, supra; Colorado Bank v. Bedford*, 310 U.S. 41, 53."

Unlike the right to prove a claim against the bank, the right to dividends *after proof of claim* is a fixed and vested right, since the federal statute sets forth no contingency by which the assets of the national bank to be devoted to payment of dividends on proven claims could inure to the benefit either of other creditors of the bank or of the stockholders or of the United States itself. Consequently there is no provision of the federal statute which expressly or by implication conflicts with the provisions of the Michigan statute as applied to the right to ratable dividends on proven claims. The Michigan Act merely provides for a change in dominion of the right to receive ratable dividends, and in this respect there is no unlawful interference with the liquidation of the bank. Instead, the State procedure actually expedites and facilitates the liquidation by handling unclaimed dividends which cannot otherwise be disposed of under the federal procedure. The escheat law no more interferes with the liquidation of the bank in its transfer of the depositor's proven claim to State control than the Michigan Probate Code so interferes in transferring a deceased depositor's proven claim to his executors, administrators or distributees.

If a State escheat law does not unlawfully interfere with the National Bank Law in the case of an operating national bank, then *a fortiori* is does not so interfere in the case of a bank in liquidation. In the latter case the bank has ceased to perform its federal functions anyway. While, to be sure, State law in such case cannot validly provide for a preferential distribution contrary to the ratable disribution provided by the federal statute (*Davis v. Elmira Savings Bank*, 161 U.S. 275), an escheat law is just the opposite, in that it

carries out ratable distribution whereby the State succeeds to the right to the proven claim, to hold for the depositor or his successors if found.

The National Bank Law does not purport to cover the matter of succession, by assignment, escheat, inheritance or otherwise, to proven claims against banks in liquidation.

As stated in *Prigg v. Pennsylvania*, 16 Peters 539, 617-618, a State does not have a right to interfere with a federal regulation on a particular subject "if Congress have a constitutional power to regulate a particular subject". Congress has no power to regulate escheats. *Anderson National Bank v. Luckett*, 321, U.S. 233, 240-241, 248; *American Loan & Trust Co. v. Grand Rivers Co.*, 159 Fed. 775 (W.D. Ky.). There is therefore no invalid interference.

No valid reason exists, or was even suggested by the court below, why the Michigan escheat law, in the case of a proven claim, should not apply to national banks, whether closed or open as this Court has held subrogation, attachment, and other assignment and devolution to apply, or in what respect the same would be repugnant to the National Bank Law. The Michigan law does not infringe the National Bank Law, but is impartial, applying to all banks and other depositories without discrimination as to national banks. *See Braun v. McPherson*, 277 Mich. 396.

Nor does the fact that insolvent national bank funds are paid to the Comptroller and by him covered into the Treasury (Sec. 192 of the National Bank Law) mean that the escheat law is repugnant to the federal law. In *United States v. Klein*, 303 U.S. 276, the Pennsylvania escheat law was held applicable to funds deposited in a federal court suit, although the same had been covered into the Treasury as required by federal statute.

It is futile for appellee to contend that, as claims against a bank are fixed as of the date of its failure, therefore a new claim cannot be made of escheat as of a later date. Ours is not a new claim. It is a derivative one in succession to a claim proved and allowed as of the date of the receivership, just like other claims of successors are.

C. This case is an example of the general rule of State law validity as to national banks. The cases permitting application of State escheat laws to national banks are merely examples of the general principle that such banks are subject to State laws which do not interfere with the purposes of their creation or tend to impair their efficiency as federal agencies. *National Bank v. Commonwealth*, 9 Wall. 353; *McClellan v. Chipman*, 164 U.S. 347; *First National Bank v. Missouri*, 263 U.S. 640.

The rules applicable to a determination of whether a State statute is repugnant to the National Bank Law are well summarized in *McClellan v. Chipman*, 164 U.S., 347, 356, where it is stated:

> "• • • Two propositions have been long since settled by the decisions of this court:
>
> "First. National banks 'are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and conconstrued by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' *National Bank v. Commonwealth*, 9 Wall. 362.

"Second. 'National banks are instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiencies of these agencies of the Federal government to discharge the duties for the performance of which they were created.' *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283.

"These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

It is apparent that this case comes within the general rule and not the exception.

To apply State escheat laws to proven claims later abandoned, whereby the State as successor to the claimant holds the money for the owner if found, interferes neither with the purposes nor the efficiency of national banks. It conflicts with no provision of the federal statute. It merely prevents the United States Treasury from keeping indefinitely money it admittedly owes proven claimants, which the United States has no power to escheat. *Amer-*

ican Loan & Trust Co. v. Grand Rivers Co., 159 Fed. 775 (W.D. Ky.).

The following quotation from *McClellan v. Chipman*, *supra*, page 359, is directly pertinent:

> "As long since settled in the cases already referred to, the purpose and object of Congress in enacting the national bank law was to leave such banks as to their contracts in general under the operation of the state law, and thereby invest them as Federal agencies with local strength, whilst, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States."

D. The Michigan statutory procedure is not contrary to due process.

The appellee did not claim below that the Michigan statutory procedure violated due process or amounted to a forfeiture instead of a true escheat, such as existed in *First National Bank of San Jose v. California*, 262 U.S. 366. Even if such question had been raised as to the Michigan law here involved, the Michigan law is a proper one. While there are presumptions of death or abandonment after seven years, these are rebuttable and the depositor or his successors may *at any time* in the future recover the fund from the State (Sections 9b, 10, 13, 13a, 22; R. 23-30). Service by publication is required if the depositor or his heirs cannot be located for service (Sections 9b, 10a; R. 23, 24-25). Full indemnity is given to the depository which

makes payment to the State as to claims of the depositor, his heirs, holders for value and assigns (Sec. 23; R. 30-31). The provisions of the Michigan law more liberally protect the depositor and the bank than those approved in *Anderson National Bank v. Luckett*, 321 U.S. 233, and *Security Savings Bank v. California*, 263 U.S. 282. Report is required (Sections 6, 6a; R. 18-20), as permitted by the *Anderson* case (p. 252). This, of course, is essential in order to permit the State to proceed further.

E. The question is not res adjudicata. Although appellee did not plead *res adjudicata* (R. 48-49), he endeavored to assert the point here in his motion to dismiss or affirm and also in opposing certiorari in present Docket No. 21 (No. 553, October, 1948, Term). This was based on the earlier decisions in the Court of Appeals previously discussed. But these related to Michigan's claim to unproven dormant deposits and not to the subject matter of the present suit to succeed to proven claims, an entirely different subject. The difference is pointed out in the opinion below (R. 68), and in *Starr v. O'Connor*, 118 F. 2d 548, 550, the nature of the prior suit as relating to unproven claims is made clear.

If the Court desires to consider a defense not pleaded or passed upon below or to look at prayers in previous suits not in the record here but appended in respondent's brief in opposition to certiorari in Docket No. 21, we refer to page 5 of our reply brief in Docket 21 and the appendix thereto referring to fact averments in the prior cases, and also to our brief in opposition to motion to dismiss in the present case (Docket No. 24, pages 1-4). But it is inconceivable that this case will be decided here upon such extraneous matter neither pleaded nor proved.

IV.

No Other Question Prevents Reversal of the Court Below

If the Court decides against appellant and holds that the Michigan law is repugnant to the National Bank Law, that, of course, ends the case. If, however, the Court holds the Michigan law to be valid when applied to a national bank in liquidation, then the Court comes to some subsidiary federal questions.

Review on appeal [Title 28, U.S. Code, Sec. 1254(2), as revised], just as under the former Sec. 240 of the Judicial Code, is of course "restricted to the federal questions presented". The Court, having decided that the Michigan law is not repugnant to the federal law, should pass upon other federal questions presented, just as in *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, the Court, having reversed the Court of Appeals on the question upon which appellate jurisdiction was based, then decided other questions involved.

The other questions were assumed by the court below in our favor but not decided (R. 68). They should now be decided. They are not difficult.

A. The District Court had jurisdiction of the subject matter. Appellee claimed otherwise in his motion to dismiss in the District Court (R. 48).

Sec. 24 of the Judicial Code, effective at the time suit was instituted (Title 28, Sec. 41, U.S. Code, before its 1948 revision), provided:

> "The district courts shall have jurisdiction as follows:
>
> * * * * *
>
> *

"(16) Of all cases commenced by the United States or by direction of any officer thereof against any national banking association, and cases for winding up the affairs of any national bank; • • •."

This does not differ materially from the present statute (Title 28, U.S. Code, Sec. 1348, as revised).

A suit with respect to a claim against a national bank brought against its receiver is, of course, a case relating to winding up the bank's affairs and within the jurisdiction of the District Court where the bank is located. *International Trust Co. v. Weeks*, 203 U.S. 364. See also the cases cited in succeeding Subdivision B, in which claims against bank receivers were entertained in the District Courts where the banks were located and which this Court would have dismissed *sua sponte* had there been no jurisdiction.

In *Auten v. United States National Bank*, 174 U.S. 125, a suit in federal court against a national bank receiver was sustained, in the absence of diversity of citizenship, as a claim arising under the laws of the United States.

B. The Receiver, who is the only necessary and proper party, is before the Court and was properly sued. Appellee claims that an alleged necessary party, the Comptroller of the Currency, is not before the Court. This is an abrupt about face by appellee, the Comptroller in an earlier case having obtained his dismissal because he was an unnecessary party. The Court of Appeals stated in *Starr v. O'Connor*, 118 F. 2d 548, 550:

"The attorney general of Michigan filed the suit on behalf of the state against the receiver of the First National Bank—Detroit and the Comptroller of the

> Currency of the United States, the latter of whom was dismissed on motion as an unnecessary party."

This playing hide-and-seek with the Court avails appellee nothing. The claim is based on the contention (R. 48) that suit could not be brought against the receiver alone because, under Sections 192 and 194 of the National Bank Law, the receiver pays the money to the Comptroller and the latter pays the dividend. But a long line of decisions has sustained suits against receivers with respect to claims against national banks, even though the Comptroller is not a party and is the one who pays the dividend. *Case v. Bank*, 100 U.S. 446; *Armstrong v. American Exchange National Bank*, 133 U.S. 433; *Earle v. Conway*, 178 U.S. 456; *Merrill v. National Bank of Jacksonville*, 75 Fed. 148 (C.C.A. 5), affirmed without discussing the point, 173 U.S. 131; *American Surety Company v. Bethlehem National Bank*, 314 U.S. 314. As stated in *Taylor v. Spurway*, 72 F. 2d 97, 99 (C.C.A. 5):

> "If it should transpire that the receiver has no funds to respond to a judgment, it must be assumed that the Comptroller, although beyond the reach of process of the court rendering the judgment, will give effect to a valid judgment of a court of competent jurisdiction. *Earle v. Pennsylvania*, 178 U.S. 449."

See also *General American Life Ins. Co. v. Anderson*, 156 F. 2d 615 (C.C.A. 6); *Wever v. Dakin*, 81 F. 2d 831 (C.C.A. 5); *Brown v. Tillinghast*, 84 Fed. 71 (D.C. Washington); and *In re Commercial National Bank*, 45 F. Supp. 482 (E.D. Pa.), affirmed on opinion below 134 F. 2d 172 (C.C.A. 3), in which last mentioned case it was held the receiver was the necessary and indispensable party to the suit to enforce the Pennsylvania escheat law against a national bank in liquidation.

In light of the overwhelming authority that suits to compel the payment of claims against a national bank in liquidation are properly brought against the receiver and not the Comptroller and the lack of any authority to the contrary of which we have knowledge, nothing is gained by discussion of the principles applicable in other situations not involving national banks, as to when a superior officer need be or need not be joined as a party.

Under the above decisions, the bank receiver is accountable to claimants. He is also accountable to the Comptroller. By Sec. 6 of the Michigan law (R. 18), escheat reports are required from "depositories indebted or accountable to any other person." The Michigan statute covers the situation squarely. The court below did not imply the contrary.

Neither *In re Chetwood*, 165 U.S. 443, nor *United States v. Weitzel*, 246 U.S. 533, cited by appellee, holds that suit may not be brought against the receiver with respect to claims against the bank. They in fact imply or state the contrary. In the *Weitzel* case it appears that the bank itself may be sued, even after the receiver is appointed.

Nor does the fact that the appellee claimed the receivership was closed make any difference. He was alleged to have been appointed and to be acting as Receiver (R. 4-5), which averment was admitted by defendant's motion to dismiss. Although in an affidavit annexed to the motion appellee claimed that the receivership was "deemed technically closed" (R. 53), the same affidavit discloses (R. 53-54) that defendant Connolly was given a commission as Receiver "to act in such incidental cases that might require action by a receiver". This is one of such cases. Furthermore, after the institution of suit *the Receiver as such* entered into a stipulation permitting him to send records to the Comptroller without prejudice to the issues involved (R. 38).

Appellee, in his attempt to answer in his favor the riddle "When is a receiver not a receiver?", seeks to rely on a self-serving statement of the Comptroller in his 1944 report to Congress (Table 45 of the Comptroller's Eighty-second Annual Report) that the receivership was closed, and hence contends that the Receiver cannot be sued. In spite of this statement, we know appellee was still Receiver when the suit was commenced. He so described himself in his appearance (R. 37), the stipulation above mentioned (R. 38), and his motion to dismiss (R. 48). The McCandless affidavit, as above mentioned, admits his appointment after the receivership was "deemed technically closed" (R. 53-54).

By what authority under the law the Comptroller can "deem" a receivership "technically closed", while still maintaining a Receiver in existence for various purposes remains unrevealed. *Also, if the Receiver is available, as appellee says, to take care of incidental matters that, in the public interest, merit attention, the filing of reports under the Michigan Escheats Law is just such a matter which, in the public interest of all the people in Michigan, merits attention.*

Further, the mere fact that the liquidation of the bank had been completed gives rise to no assumption which has any relevance to this suit. The only point at which, according to the National Bank Act, the Receiver may be "discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof" is upon payment of the full amount of all claims to creditors and transfer of remaining assets to an agent for the shareholders under Sec. 197 of the Act. See *United States v. Weitzel*, 246 U.S. 533, 541. Therefore, until the steps required in Sec. 197 can be taken, the Receiver is not discharged of all his duties to creditors or anyone standing

in place of such creditors. The fact that appellee can admittedly do some acts as Receiver means that he is a Receiver for all receivership matters which arise; for there is no provision in the law which provides for a limited Receiver.

While the affidavit in support of appellee's motion to dismiss asserts (R. 53) that the records, proofs of claim, checks, etc., are "invariably forwarded" on the termination of a receivership to the Comptroller, there not only is no authority in law for such asserted practice, but so to do would be contrary to the National Bank Act, Title 12, Sec. 192, U.S. Code, which states, among other things:

> "Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, * * *."

Certainly, while still in office, he had violated this direct statutory command if he surrendered his possession to the Comptroller or anyone else, and Connolly was right, if his motion was meant to refer to such records and checks, when he denied he was acting as the validly appointed or authorized agent or representative of the Comptroller (R. 48-49).

C. This is not a case against the United States. Appellee, although he did not so plead below, now claims that the present suit amounts to one against the United States, disregarding the cases cited by us and innumerable other ones sustaining suits on claims against bank receivers. The funds awaiting payment on proven claims do not belong to the United States. Congress has no power, even had it wished, to declare escheat thereof to the United States. *Anderson National Bank v. Luckett*, 321 U.S. 233, 240-241, 248; *American Loan & Trust Co. v. Grand Rivers Co.*, 159

Fed. 775 (W.D. Ky.). The fact that the funds may be paid into the United States Treasury does not prevent escheat under a State law. *United States v. Klein*, 303 U.S. 276. As we have pointed out, moneys payable on proven claims do not augment payments otherwise due on other claims. The same will lie in the Treasury indefinitely unless the State is held validly to succeed to proven claims under its right to control the devolution of property and unless the State can take action to discover the claimants or their successors. Thus, although the United States has no right to keep the funds and does not claim the right, appellee nevertheless seeks, in effect, to have the money escheat to the United States, by contending that this is a suit against the United States and not properly brought against the Receiver.

Appellee relies on *Aldrich v. Chemical National Bank*, 176 U.S. 618, (59 Fed. 372); *O'Connor v. Rhodes*, 79 F. 2d 146 (C.A., D.C.); *Burnell v. United States*, 44 Ct. Cl. 535; *Maricopa County v. Valley National Bank*, 318 U.S. 357; *Richmond F. & P. R. Co. v. McCarl*, 62 F. 2d 203 (C.A., D.C.), certiorari denied 288 U.S. 615; and *Haskins Bros. & Co. v. Morgenthau*, 85 F. 2d 677 (C.A., D.C.), certiorari denied 299 U.S. 585. None of them sustains appellee's point. They make it clear that the suit is not one in substance against the United States, when the United States makes no claim to the funds but is holding them admittedly for other persons. Appellee's argument proves too much. If well founded, no suit to establish a claim could be brought against any national bank receiver for any purpose.

The case of *In re Escheat of Moneys*, 358 Pa. 133, 57 A. 2d 256, relied upon by appellee, illustrates the type of case where escheat cannot be asserted. There, by federal statute, unclaimed seamen's wages paid into the Treasury were applicable to the relief of other destitute seamen, etc.

Of course, Pennsylvania could not escheat the same as successor to the seaman who had not claimed his wages, as in such event the federal law expressly appropriated the wages to another purpose. As we have pointed out, nothing of the sort appears in the National Bank Act as to proven claims. The money is in the federal Treasury awaiting claimants. The United States makes no claim thereto and has no right thereto. Suppose the administrator of a claimant appeared and sought the money but the Comptroller doubted the validity of the administrator's appointment and the administrator brought suit. Certainly this would not be a suit against the United States. Neither is it a suit against the United States when the State of Michigan claims succession by escheat to the right of a disappeared claimant. See also *United States v. Borcherling*, 185 U.S. 223, 232.

United States v. Klein, 303 U.S. 276, is the controlling authority as to the right to escheat funds admittedly due to private claimants, although the funds have been paid into the United States Treasury. See also the companion case, *United States v. Klein*, 106 F. 2d 213 (C.C.A. 3), certiorari denied 308 U.S. 618.

CONCLUSION

The judgment of the Court of Appeals should be reversed. The Michigan escheat law should be held valid and not repugnant to the National Bank Law in its application to proven claims against First National Bank—Detroit in liquidation. The appellee Receiver should be held bound in this suit to make report to the State Board of Escheats as to proven claims against the bank where dividend payments have not been made for seven years or more after the dividends became payable. The case should be remanded to the District Court for the purpose of taking such further action as may be necessary to effect escheat of such unpaid moneys to the State of Michigan.

Respectfully submitted,

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APPENDIX

APPENDIX

Title 12 U. S. Code (National Banks)

Sec. 191. General grounds for appointment of receiver.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192 of this title.

Sec. 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and

may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: *Provided*, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits.

Sec. 193. Notice to present claims.

The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

Sec. 194. Dividends on adjusted claims; distribution of assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.